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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DIXIE FINANCE COMPANY, INC. and
TRANSOUTH FINANCIAL CORPORATION,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMICUS CURIAE CONSUMER CREDIT INSURANCE ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF CONSUMER CREDIT INSURANCE ASSOCIATION

The Consumer Credit Insurance Association ("CCIA") is a trade association of 170 insurance companies which provide insurance to consumers in connection with credit and financing transactions.[1] CCIA members provide an

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[1] The filing of this brief *amicus curiae* has been consented to by petitioners and respondent.

overwhelming majority of the credit insurance issued in this country. Most of this insurance is sold to consumers through creditors, such as the petitioners in this proceeding. All sales of credit insurance issued by CCIA members are extensively regulated by State law and by State insurance authorities. CCIA is interested in this case because respondent, the Federal Trade Commission ("FTC"), is seeking to investigate and regulate the sale of credit insurance. The FTC's actions, approved by the court below, are contrary to the applicable decisions of this Court and other federal circuits. If the decision below is allowed to stand, the FTC may succeed in adding to existing State regulation an unnecessary, unauthorized, and potentially conflicting layer of regulation of the sale of credit insurance. It is the position of CCIA that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, was intended precisely to prevent this result. Furthermore, the intent of the McCarran-Ferguson Act was strongly re-affirmed in the Federal Trade Commission Improvements Act of 1980.

ARGUMENT

The FTC investigation, pursuant to which the Civil Investigative Demands were issued to petitioners, had as its objective the determination of whether finance companies and other creditors were misrepresenting that the purchase of credit insurance was a prerequisite to obtaining credit.[2] CCIA, as Judge Reavley in his persuasive dissent below, Appendix at 18a-21a, does not condone the use of any overbearing or deceptive practices in the sale of insurance. CCIA has long been on record against the use of such practices.[3] Furthermore, State law prohibits such

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[2] Appendix to Petition for Writ of Certiorari at 26a n.1 (hereinafter "Appendix").

[3] Furthermore, CCIA believes that the FTC's allegations of the use of such practices are grossly exaggerated. The FTC's continuing commentary about such alleged activities is detrimental and unfair to the consumer credit industry.

practices. That is not the issue here, however. Rather, what is at stake is the unequivocal national policy that the business of insurance in general, and the sale of insurance in particular, is for the *States* to regulate.

As has been acknowledged by the FTC and by the courts below, the FTC is prohibited from investigating the "business of insurance" under section 2 of the McCarran-Ferguson Act, 15 U.S.C. § 1012, and under section 6 of the Federal Trade Commission Act, 15 U.S.C. § 46.[4] Thus, the sole issue in this case is whether the alleged practices used to sell credit insurance constitute the "business of insurance." It is CCIA's position that the Court of Appeals erred in upholding the FTC's contention that the asserted practices are not part of the business of insurance.

As a matter of logic, the FTC's position is untenable. If the misrepresentations alleged by the FTC were made, they could have been made for one and only one purpose: *to sell insurance.* The alleged misrepresentation would serve no purpose unless the individual had already decided that he or she wanted credit and the creditor was prepared to extend credit. The only objective of such a misrepresentation would be to convince such a person to buy credit insurance. The District Court's statement that the practices in question would "induce the purchase of credit," Appendix at 8a, simply defies logic. It is equally obvious that the sale of insurance is part of the business of insurance. Indeed, there is no aspect of the business

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[4] Under section 2 of the McCarran-Ferguson Act, the prohibition against FTC regulation of the "business of insurance" applies only where such business is regulated by State law. (Section 6 of the Federal Trade Commission Act includes no such limitation.) It appears to be undisputed, however, that all States in which petitioners sell insurance regulate the sale of insurance generally, and specifically prohibit misrepresentations in the sale of insurance. Petition for Writ of Certiorari at 3 & n.2.

that is more fundamental. Without a sale, there is no insurance.

As a matter of law, the decision below conflicts with prior applicable decisions by this Court. *FTC v. National Casualty Co.*, 357 U.S. 560 (1958), established that the methods used to sell insurance (*e.g.*, advertising) are part of the "business of insurance," are regulated by State law, and are thus outside the authority of the FTC. That *National Casualty* is still law is beyond dispute. Indeed, this Court later cited *National Casualty* as holding that the "business of insurance" includes "the selling and advertising of policies." *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969).

Nonetheless, the Court of Appeals declined to follow *National Casualty*. Although the appellate court gave no reason for rejecting *National Casualty*, it apparently relied on the reasoning of the District Court. Inasmuch as the statements alleged to have been made could have had no purpose other than inducing the sale of insurance, the only ground for distinguishing *National Casualty* suggested by the District Court was that the alleged statements did not involve the "terms" of insurance policies. Appendix at 5a. There is nothing in *National Casualty* which supports or even suggests such an artificial limitation, however. It is clear that more is involved in selling insurance than listing the terms of the policy.

Moreover, the ruling of the Court of Appeals is at odds with rulings of two other circuits. Both the Second Circuit and the Ninth Circuit have held that the alleged practice of requiring a borrower to purchase life insurance coverage through the lender insurance company is part of the "business of insurance," and therefore exempt from federal antitrust laws under the McCarran-Ferguson Act. *Dexter v. Equitable Life Assurance Soc'y.*, 527 F.2d 233 (2d Cir. 1975); *Addrisi v. Equitable Life Assurance Soc'y.*, 503 F.2d 725 (9th Cir. 1974), *cert.*

denied, 420 U.S. 929 (1975).[5] The District Court's suggestion that *Group Life & Health Ins. Co. v. Royal Drug*, 440 U.S. 205 (1979), somehow overruled these decisions is unexplained and without basis. That court's further suggestion that the result in the instant proceeding might be different if petitioners were insurance companies is totally unjustified in view of the emphasis of *Royal Drug* on whether the *activity* involved was the "business of insurance," rather than whether the actor was an insurance company. 440 U.S. at 211. The activity involved here is the sale of insurance, and that activity is clearly within the scope of the McCarran-Ferguson Act.[6] *See* dissenting opinion of Judge Reavley, Appendix at 18a-19a.

CCIA is particularly concerned about the FTC's activities in this case because the FTC's long history of overstepping its jurisdictional bounds and venturing into the business of insurance (*e.g.*, *FTC v. National Casualty Co.*, *supra*) led to transgressions of such proportions in the late 1970's that Congress found it necessary to enact legislation telling the FTC what it should have known already: the FTC was not even to *investigate* the business of insurance except as specifically authorized by Congress. Section 5, Federal Trade Commission Improvements Act of 1980, Pub. L. 96-252, 94 Stat. 374. The instant investigation is in direct violation of that Act.

The 1980 Act was necessitated by the FTC's wide-ranging investigations into the business of insurance. S.

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[5] As the court stated in *Dexter*, "[f]orcing people to buy insurance may well be an undesirable practice—and we do not suggest we approve of it—but it is part of the 'business of insurance.'" 527 F.2d at 235.

[6] *Peacock Buick v. FTC*, 86 F.T.C. 1532 (1975), *on reconsideration*, 87 F.T.C. 379 (1976), *aff'd per curiam*, *Peacock Buick, Inc. v. FTC*, 553 F.2d 97 (4th Cir. 1977) (notation of unpublished opinion only), reached a contrary result. It is CCIA's position that the Fourth Circuit decision, like the decision below, was erroneous. In any event, *Peacock* demonstrates further the need to resolve a conflict among the circuits.

Rep. No. 500, 96th Cong., 1st Sess., at 14 (1979). In passing the legislation, Congress made it clear that existing law *already* prohibited the FTC's insurance activities. The legislation was needed only because the FTC was "misconstruing" its jurisdiction, was engaging in "unauthorized" activities, and had "erroneously" interpreted the McCarran-Ferguson Act. *Id.* at 13-14.[7] In light of this clear message to the FTC, CCIA finds it incredible and disturbing that the FTC is once again trying to get its foot in the door of the insurance business.[8] As noted by the conferees on the Federal Trade Commission Improvements Act of 1980, if the FTC believes it should have broader authority than it has been given, it "should exercise the authority it has to propose such legislation as it considers appropriate." H.R. Rep. No. 917, 96th Cong., 2d Sess., at 29 (1980).

The FTC has exceeded its authority in the instant case, and based on its history, will likely attempt to do so again. It is important that the limits to the FTC's authority be defined and enforced by this Court. Otherwise, the FTC may succeed in disrupting the extensive and comprehensive system of State regulation of insurance sales, the result the McCarran-Ferguson Act was intended to prevent.

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[7] Congress also reiterated that the "selling and advertising of policies" is part of the business of insurance. *Id.* at 15.

[8] The disregard shown by the FTC for limits on its authority is nowhere better illustrated than in the present proceeding. In *USLIFE Credit Corp. v. FTC*, 599 F.2d 1387 (5th Cir. 1979), the Fifth Circuit held that alleged *oral* misrepresentations regarding credit insurance did not violate section 106 of the Truth-in-Lending Act, 15 U.S.C. § 1605, because that Act only requires *written* disclosures. Notwithstanding this clear holding, the FTC has stated that the purpose of its investigation in the instant proceeding is to determine whether the alleged *oral* statements "circumvent" the Truth-in-Lending Act. Appendix at 25a.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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